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ALEXANDER

No. 83-623

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANK B. JAMES, ET AL., PETITIONERS

v.

WILLIAM P. CLARK,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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TABLE OF AUTHORITIES

Page

Cases:

Johnson v. *McIntosh*, 21 U.S. (18 Wheat.) 543 ..... 4, 5

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 ..... 3, 4, 5

Oneida Indian Nation v. *County of Oneida*, 719 F.2d 525 6

United States v. *Kagama*, 118 U.S. 375 4

United States v. *Santa Fe Pac. R.R.*, 314 U.S. 339 4

United States v. *Wheeler*, 435 U.S. 313 4

Wilson v. *Omaha Indian Tribe*, 442 U.S. 653 4

Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 4

Constitution and statute:

U. S. Const. Art. I, § 3 (Indian Commerce Clause) 3, 4

Indian Nonintercourse Act, 25 U.S.C. 177 2

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1. Since 1974, litigation has been pending in the United States District Court for the District of Massachusetts concerning claims to land in the Town of Gay Head, on Martha's Vineyard, advanced by the Wamponoag Tribe of Gay Head Indians. *Wampanoag Tribal Council of Gay Head, Inc.* v. *Town of Gay Head,* Civil Action No. 74-5826-MC (*Gay Head I*). We are advised that an agreement in principle to settle that litigation has been reached by the immediate parties; but legislation to implement the settlement must still be enacted by Congress and the Massachusetts General Court.

Petitioners are 102 individuals who claim to be members of the Gay Head Tribe or descendents of members and who are dissatisfied with the proposed settlement of *Gay Head I.* They also brought suit in the District of Massachusetts,

claiming the right to possession of all land in the Town of Gay Head. They claim to represent a class of all members and descendents of the Tribe. First Amended Complaint, paras. 1(b), 3(a).

Petitioners allege that their aboriginal tribal ancestors came to Gay Head Peninsula on Martha's Vineyard about 4,000 years ago. In 1869, according to petitioners, the Massachusetts legislature authorized the alienation of Indian land in the State without federal assent. The following year, petitioners allege, Massachusetts, again without federal authority, purportedly incorporated the Gay Head Reservation as a town and authorized the allotment or conveyance of the Gay Head tribal lands. Petitioners further allege that as a result of the 1869 and 1870 legislation, certain Indians, without federal consent, have conveyed lands to non-Indians. Petitioners contend that because these conveyances were made without the consent of the United States, they are invalid. First Amended Complaint, paras. 11, 21-23.

The district court dismissed the complaint, reasoning that in attempting to invalidate the conveyances petitioners could not invoke the Indian Nonintercourse Act, 25 U.S.C. 177, because they sued as individuals and "only an Indian nation or tribe may bring an action under [the Nonintercourse] Act" (Pet. App. B1-B2). The district court also rejected petitioners' arguments based on the Constitution and various other federal statutes on the ground that they "are either dependent upon their Nonintercourse Act claim or are independently devoid of merit" (*id.* at B2).

The court of appeals affirmed (Pet. App. A1-A13). It too rejected petitioners' argument based on the Indian Nonintercourse Act on the ground that only a tribe may invoke

that statute and petitioners sued as individuals (*id.* at A3).[1] The court then ruled that the Indian Commerce Clause of the Constitution, Article I, Section 8, Clause 3, did not invalidate the Massachusetts statutes authorizing the conveyances because the Clause does not "automatically and necessarily preempt[] all state laws dealing with Indians" but instead requires a court to "balance[] the interests of the federal, state, and tribal authorities" (Pet. App. A5). The court of appeals then discussed these interests at length (*id.* at A5-A11) and concluded that "this 'balance' tilts decisively in favor of the application of the state laws" (*id.* at A9-A10).

2. a. In our view, the court of appeals erred in concluding that Massachusetts was free to authorize the alienation, without federal consent, of an Indian tribe's right to occupy its aboriginal lands. As this Court has recently explained (*Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974)):

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original States and the United States — a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of

[1] The court of appeals also upheld the district court's decision denying petitioners leave to amend their complaint to attempt to cure this defect (Pet. App. A12-A13).

> the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

"The rudimentary proposition[] that Indian title * * * can be extinguished only with federal consent appl[ies] in all of the States, including the original 13" (*id.* at 670).

The court of appeals appears to have dismissed these statements as "dicta" (Pet. App. A5) inconsistent with "modern Indian law" (*id.* at A4). But the principle that Indian title cannot be alienated without federal assent has been established by a long line of cases. See, *e.g.*, *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 345-347 (1941) ("Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. * * * As stated by Chief Justice Marshall in *Johnson* v. *M[c]Intosh*, [21 U.S. (18 Wheat.) 543], 586 [(1823)], 'the exclusive right of the United States to extinguish' Indian title has never been doubted."); *United States* v. *Kagama*, 118 U.S. 375, 381 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.). 515, 560 (1832); *id.* at 584 (McLean, J.); *Johnson* v. *McIntosh*, *supra*. See also *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979); *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). This ancient principle precludes the balancing of interests in which the court of appeals engaged.

The court of appeals relied (Pet. App. A5) on a number of cases decided under the Indian Commerce Clause that suggest that that Clause does not preempt all state regulations of Indian affairs. But as this Court's opinion in *Oneida* makes clear, Congress's power under the Indian Commerce Clause is not the sole source of the rule that Indian title cannot be alienated without the consent of the federal government. That principle is rooted in the relationship

between Indian tribes and the succession of sovereigns that have ruled the land they occupied, and it is among the attributes of sovereignty to which the United States succeeded. See 414 U.S. at 667, quoted at pages 3-4, *supra*.

The court of appeals also reasoned that "[t]he original enactment of the INA [Indian Nonintercourse Act] in 1790 suggests that the first Congress did not believe that the Indian Commerce Clause — in and of itself — prohibited state laws validating Indian land conveyances. Otherwise, why would the INA have been necessary?" (Pet. App. A10-A11). But the principle that Indian title cannot be alienated without the consent of the sovereign antedated the Nonintercourse Act (see *Oneida*, 414 U.S. at 667); that statute constitutes a congressional assertion of preexisting prerogatives (*ibid.*) and, of course, imposes a criminal penalty for improper attempts to obtain lands from Indians (see *id.* at 668 n.4; 25 U.S.C. 177). Indeed, in *Johnson* v. *McIntosh*, *supra*, the Court refused to recognize conveyances made by Indians in 1773 and 1775 on the basis of this principle; these conveyances occurred not only before the Nonintercourse Act was passed but before the Union was formed.

The Court in *Johnson* v. *McIntosh* also treated the existence of legislation proscribing transactions with Indians in a fashion wholly inconsistent with the reasoning of the court of appeals. *Johnson* rejected the argument that because certain colonial legislatures had enacted laws prohibiting purchases from Indians, Indians' conveyances were valid where there was no such legislation; instead, the Court reasoned that such legislation merely confirmed a universally recognized prohibition against the alienation of Indian title. "[T]he fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy" (21 U.S. (8 Wheat.) at 604). Similarly, the

Nonintercourse Act merely confirmed the authority of the federal sovereign. See also *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 530-532 (2d Cir. 1983).

b. Because federal prerogatives over the alienation of Indian title are rooted in the Constitution and in the federal government's sovereignty, and were merely confirmed by the Nonintercourse Act, the question whether petitioners have stated a claim under the Act appears to us to be of limited importance. To be sure, the question whether petitioners are entitled to assert the rights of the Tribe is crucial. See pages 6-7, *infra*. But the court of appeals' decision does not rest on the conclusion that petitioners were not entitled to do so; indeed, the court of appeals specifically noted that that question would be more appropriately resolved in another proceeding (Pet. App. A13). Since petitioners claim to represent a class consisting of all members and descendents of members of the Tribe, and the Tribe itself is not recognized by the federal government, it is certainly not obvious that petitioners' complaint, on its face, fails to allege that petitioners are entitled to assert the Tribe's Indian title.

3. Although we believe the court of appeals erred, we do not urge this Court to grant review at this time. The proposed settlement of *Gay Head I*, if implemented through an Act of Congress (as is contemplated), will extinguish all claims to the land in issue here that arise from the Gay Head Indians' aboriginal title; that, of course, includes petitioners' claims. Litigation is now pending in the lower courts in which petitioners have sought to enjoin the proposed settlement on the ground that they, not the plaintiffs in *Gay Head I*, legitimately represent the Gay Head Indians. *James* v. *Bellotti*, No. 83-3562-Mc (D. Mass.), on appeal from denial of a preliminary injunction, No. 83-1878 (1st Cir.).

There would be little purpose in the Court's reviewing petitioners' present contentions if petitioners' claims will ultimately be extinguished by legislation. Indeed, if the settlement of *Gay Head I* is upheld, the proper course may be to vacate the decisions below as moot and order petitioners' complaint dismissed. On the other hand, should petitioners' claim to represent the interests of the Gay Head Indians be sustained, the court of appeals' erroneous rejection of their arguments might well warrant review. We accordingly submit that the Court should hold the petition pending the resolution of *James* v. *Bellotti, supra,* or a legislative resolution of the Gay Head claims. We will apprise the Court of pertinent developments when they occur.

Respectfully submitted.

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